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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-579

WILLIAM PRENTIS TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, WILLIAM PRENTIS TUCKER, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 14, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 14, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Trial Court erred in failing to dismiss the indictment and in denying the Motion for Judgment of Acquittal on the ground that the statute under which this prosecution proceeded does not apply to the facts and circumstances of this case.

2. Whether the Trial Court erred in failing to grant the Motion to Suppress evidence seized from Petitioner's automobile.

STATUTES INVOLVED

Title 18 U.S.C., Appendix, Section 1202(a) and 1202(c) (2). The text of these Statutes appear in the Appendix hereto.

STATEMENT OF THE CASE

The Petitioner, WILLIAM PRENTIS TUCKER, was indicted for a violation of 18 U.S.C., Appendix 1202(a) for knowingly receiving in interstate commerce a firearm having been convicted of felonies by Courts of the United States. The prior felony convictions were for violations of the Internal Revenue Liquor Laws and conspiracy in 1943 and 1961. Motions to dismiss the indictment and to suppress certain evidence seized were denied. The Petitioner waived jury trial, was convicted following trial by the Honorable WILBUR D. OWENS, JR., United States District Judge, Middle District of Georgia, Macon Division, and was sentenced to two (2) years in the custody of the Attorney General ordered to serve six (6) months, the balance suspended, and was placed on probation for five (5) years.

On Appeal, the United States Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction. A petition for a stay of the mandate was filed with the Court of Appeals and Petitioner remains at liberty on his appeal bond.

Search warrants were issued for the trailer of Petitioner's girlfriend, one DAISY HUGHES, and Petitioner's person supported by an affidavit which recited facts concerning Petitioner's alleged involvement in a lottery operation. The affidavit stated that Petitioner had been seen at the trailer on prior occasions, and the agents who were to execute the search were told that Petitioner was expected to be at the trailer the day of the search. The warrants were executed on December 18, 1973. While the search of the trailer was underway, Petitioner drove up to the

trailer, parked and locked his automobile, and entered the premises. His person was searched pursuant to the warrant. While Petitioner was in the trailer an agent, by looking through the window of the automobile, saw a firearm on the front seat of said automobile. The keys to said automobile were taken from Petitioner and the firearm was seized. Petitioner did not consent to this search of his automobile. At no time on this day was Petitioner under arrest.

At the time of the search of the car, the search of Petitioner's person was completed and Petitioner was in the trailer with several law enforcement officers.

I.

THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION TO SUPPRESS EVIDENCE SEIZED FROM PETITIONER'S AUTOMOBILE.

All searches and seizures without a warrant are, per se, illegal under the requirements of the Fourth Amendment and unreasonable. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). While this rule is subject to certain well-defined exceptions in which a warrantless search may be justified, these exceptions are carefully and jealously drawn; and the burden of showing that one of the exceptions should be invoked, because the exigencies of the situation made that course imperative, must be borne by those who seek the exemption. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

One of these exceptions to the Fourth Amendment search and seizure limitations is the automobile exception, first identified by the Supreme Court in *Carroll v. United States*, 267 U.S. 132 (1924), which allowed the warrantless search, and admission of the fruits of that search into evidence, of a car during Prohibition. The court justified its ruling by saying that where an automobile or other vehicle is involved, it is not practical to secure a warrant because the vehicle may be moved out of the jurisdiction before a warrant can be obtained. This exception originally set out in *Carroll, supra*, was more narrowly defined by the Supreme Court in *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), which said that a warrantless search of an automobile on the side of a highway is not reasonable where "*exigent circumstances*" exist *and* where there is probable cause.

The instant situation does not constitute one in which there are exigent circumstances. Petitioner was in the housetrailer at the time of the search. The car and its contents were not in any danger of being removed from the jurisdiction, or the evidence destroyed or never found again because the car was locked and the Government agents had the keys to it.

At the point at which the gun was sighted in Petitioner's locked car, agents had just completed a thorough personal search of Petitioner. If anything, at this point the agents were sure that Petitioner *was unarmed* and in the trailer far from an area in which he might reach for a gun, i.e., his car. In *Chimel v. California*, 395 U.S. at 762-763, 89 S.Ct. at 2040

(1968), the Court held that you could search the person arrested and the area within his immediate control into which he might reach for a weapon or to destroy evidence. Petitioner's locked car, the keys to which he did not even have at this point, which was outside the trailer does not appear to present the area contemplated in *Chimel, supra*, at 763.

The Government relied on the plain view exception in order to justify the illegal search of Petitioner's car and consequent illegal seizure of his revolver. The Supreme Court has discussed this subject at length in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, rehearing denied 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed.2d 20 (1971).

In light of *Coolidge v. New Hampshire, supra*, it should be pointed out again that at no time during that day was Petitioner under arrest, and consequently, in no way can the search and seizure be justified as incident to lawful arrest. In addition, there is no indication that the agent had any prior justification for being where he was when he sighted the evidence. The agents were executing two search warrants—one for the Petitioner's person (and he was in the trailer being searched when the "plain view" observation was being made out at his car), and the other for Mrs. HUGHES' housetrailer. This view was not achieved in execution of the search warrant for either the Petitioner or the housetrailer, nor does it appear that there was any " 'hot pursuit' of a fleeing suspect." *Coolidge, supra*, at 465.

Petitioner's motion to suppress the evidence should have been granted. The search as conducted was not based on the requisite probable cause *and* exigent

circumstances, *Coolidge v. New Hampshire, supra*, in that: (1) Petitioner was effectively in custody during the whole time he was in the trailer and had no access to his car; (2) Petitioner had been searched pursuant to the warrant, and was found to be unarmed; so, there was no danger to the agents' safety; (3) this was not a search incident to arrest, as Petitioner was at no time placed under arrest; (4) this did not appear to be a search for contraband or fruits of a crime; and (5) according to the affidavits authorizing the search warrants as to Mrs. HUGHES' trailer and Petitioner's person, the investigation was conducted over an extended period of time during which the agents allegedly came to believe that Petitioner was carrying the money each day to the HUGHES trailer. The agents, therefore, allegedly had probable cause to search the automobile long before they actually searched it and a great deal of time to obtain a warrant. Therefore, there is no excuse for their failure to obtain a warrant for the search.

Neither should the Court uphold this search and seizure under the plain view exception in that: (1) there was no prior justification such as a warrant for another object in the car, hot pursuit or search incident to arrest to allow the agent to rightfully be where he was when he saw the revolver; (2) there was in fact no warrant to search the car for any items at all; and (3) plain view alone is not sufficient in and of itself.

Finally, the search was not inadvertent. The agents saw Petitioner drive up in the car, knew he had arrived in it, and discovered the revolver in the car while making an exploratory search beyond the bounds of

their warrants for Petitioner's person and the house-trailer. There was no other reason that the agents looked in Petitioner's car.

The discovery and seizure of the revolver should require an exercise of the exclusionary rule because the search was not lawful, *Wong Sun v. United States*, 371 U.S. 471, 487-488; 83 S.Ct. 407, 417; 9 L.Ed.2d 441 (1963).

II.

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE INDICTMENT AND IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL ON THE GROUND THAT TITLE 18, U.S.C., APPENDIX, SECTION 1202 DOES NOT APPLY TO THE FACTS AND CIRCUMSTANCES OF THIS CASE.

It is the position of the Petitioner that the statute under which he was prosecuted does not apply to the felonies described in the indictment and to the presented evidence by the Government of previous felony convictions. In other words, 18 U.S.C., Appendix 1202 does not apply to a person who has been convicted of "moonshining." At this time, we must point out to the Court that the indictment did not charge and the evidence did not show that Petitioner was a violent man or that he had a propensity for violence. Further, Petitioner contends that "the definition of 'felony' " in Title 18 U.S.C., Appendix, Section 1202(c)(2) "creates a classification violating the Fifth

Amendment." Footnote 4, *United States v. Bass*, 404 U.S. 336 (1971).

Any number of cases have recognized the principle that "the meaning of a federal statute is for the federal courts to decide." *Enocks v. Smith*, 359 F.2d 924, 926 (5 Cir., 1966). Therefore, it is important to determine what guidelines are used by the courts when interpreting a federal statute, *N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 48, 72, 84 S.Ct. 1063, 1071, 12 L.Ed.2d 129, (1964), and what the evil or mischief is at which the statute is aimed. *United States v. American Trucking Association*, 310 U.S. 534, 544, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940).

The legislative history of this Statute must also be looked at. The legislative history behind 18 U.S.C. §1202(a) has been set forth in *Stevens v. United States*, 440 F.2d 144 (6 Cir., 1971), as an appendix thereto beginning on page 152. This statute was accepted as an amendment to the Omnibus Crime Control and Safe Streets Act of 1967, and was sponsored by Senator Long of Louisiana. During discussion of the proposed amendment, Senator Long on May 17, 1968 (as quoted in the Congressional Record-Senate) stated:

> "... there are a lot of lunatics, mental incompetents, and members of the criminal element who have guns and have been *using them to rob, plunder, and commit all sorts of crimes.*" (*Stevens, supra*, at 155) (emphasis added).

In justifying his proposed amendment under the Commerce Clause of the Constitution, Senator Long said:

"You cannot do business in an area, and you certainly cannot do as much of it and do it as well as you would like, if in order to do business you have to go through a street where there are *burglars, murderers, and arsonists* armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce." *Stevens, supra*, at 156. (emphasis added).

Furthermore, during his remarks the Senator made reference to preventing assassinations such as those of President Kennedy and Martin Luther King, inasmuch as the alleged perpetrators of these acts were within the purview of his legislation. *Stevens, supra*, at 154, 155, 156 and 158. It was also suggested that many instigators and participants in riots such as those following the assassination of Dr. King might be prosecuted if they are within the sanctions of the amendment. *Stevens, supra*, at 156-157. Reference was also made to the effect of the amendment to "triggermen" of "Mafia" bosses in taking care of the "underworld element." *Stevens, supra*, at 157.

The proposal was again presented by Senator Long on the floor of the Senate on May 23, 1968, at which time he stated that:

"Clauses 1-5 (Clause 1 being convicted felons) describe persons, who by their actions, have demonstrated that they are dangerous, or that they may become dangerous.

. . "The recent history of this Country is full of illustrations of *assassinations and murders* committed with firearms by persons described in clauses 1-5." *Stevens, supra*, at 160-161.

The Senator then mentioned the recent murders of several persons of prominence, and explained that:

> "All of these murderers had *shown violent* tendencies before they committed the crime for which they are most infamous. They should not have been permitted to possess a gun." . . .
>
> "Of all the gun bills that have been suggested, debated, discussed and considered, none except Title VII attempts to bar possession of a firearm *from persons whose prior behaviors have established their violent tendencies.*" . . .
>
> "Upon his conviction, however, Title VII could deny every *assassin, murderer, thief,* and *burglar* of the right to possess a firearm in the future. . ." *Stevens, supra,* at 161 (emphasis added).

After again discussing the assassinations of President Kennedy and Dr. King, Senator Long stated that:

> "It (Title VII) deals solely with those who have demonstrated that they cannot be trusted to possess a firearm—those whose prior acts—mostly voluntary—have placed them outside of our society. Their very acts show that society must be protected from them. They have no right, constitutional or otherwise, to prey upon and menace our leaders, or our citizens who are pursuing their own constitutional rights . . .
>
> "Despite all that has been said about the need for controlling firearms in this Country, no other amendment heretofore offered would get at the Oswalds or the Galts. *They are the types of people at which Title VII is aimed.*" *Stevens, supra,* at 162.

Senator Long continued by saying that:

> "While this, of course, could not have saved every person who has been assassinated—certainly

it would not have saved my father—at the same time, it would apply to many of the most fiendish assassinations that have occurred in our time." *Stevens, supra*, at 162.

The sponsor of this proposed amendment then discussed the fact that there were at this time a number of marchers in Washington who had blocked the passageways of the House of Representatives and that,

"... it would be comforting to know that among those people blocking the halls so that Congressmen cannot pass are not a group of convicted felons who have been convicted of *murder, dope peddling*, and *crimes of that nature*, and that they are not armed to the teeth with shotguns or high powered rifles." *Stevens, supra*, at 163. (emphasis added).

In two portions of this legislative history (at *Stevens, supra*, at 161 and 164) the Senator analogizes this amendment to the legal theory that every dog is entitled to one bite.

"... if one owns a dog and the dog attacks his neighbor, the owner is not liable if he did not know that the dog was *dangerous*. But if the dog attacks one neighbor, and it is a serious injury, and thereafter attacks someone else, the owner is on notice that the dog is dangerous.

"This amendment would proceed on the theory that every *burglar, thief, assassin*, and *murderer* is entitled to carry a gun until the commission of his first felony; but, having done that, he is then subject to being denied the right to use those weapons again." *Stevens, supra*, at 164-165. (emphasis added).

The obvious intent and purpose of this statute is to prevent the possession of firearms by persons whose past conduct or mental conditions show that they have a propensity for violence, much as a dog might have for biting a neighbor. Every specific crime mentioned by the sponsor of this bill is one involving either violence or a propensity for violence. This legislation was proposed in the aftermath of several assassination-type murders, and had the prevention of other such murders in mind. Thus, the evil or mischief sought to be remedied is not applicable to liquor cases; and the statute cannot be applied, according to the intention of the sponsor, to such cases.

Senator Long recognizes (*Stevens, supra*, at 154-155) the right and privilege of citizens to possess firearms historically for self-defense of his person and his home.

> "While we may be willing for a citizen to have a gun for the defense of his home–and I certainly have no objection to it–we do not want the *murderers*, the *burglars*, the *rapists*, the *looters*, or the *arsonists* armed to the teeth and walking the streets . . .
>
> "That being the case, it makes good sense that we should see to it that citizens as far as Federal law is concerned, can have weapons for self-defense." *Stevens, supra*, at 155. (emphasis added).

There is a well-recognized right of a citizen of this country to protect himself and his family from harm, and his right to so arm himself is only lost when he has demonstrated himself to be dangerous to the safety and welfare of society. Thus, as Senator Long obviously intended, this inherent right to bear arms is not to be

infringed upon until a person has shown his dangerous propensities for violence through felonious criminal acts, into which a liquor violation would not fall even though technically it is a felony. The spirit and purpose of Title VII will not include such non-violent felonies.

CONCLUSION

For the reasons stated, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted:

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CERTIFICATE OF MAILING

The undersigned hereby certifies that 3 true and correct copies of the foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit was, on this 13 day of November, 1974, mailed, postage prepaid, to the HONORABLE ROBERT BORK, Solicitor General, Department Of Justice, Washington, D.C. 20534.

/s/ Oscar B. Goodman

APPENDIX A

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UNITED STATES of America, Plaintiff-Appellee,

v.

William Prentis TUCKER, Defendant-Appellant.

No. 74-2225
Summary Calendar.*

**United States Court of Appeals,
Fifth Circuit.**

Oct. 14, 1974.

Defendant was convicted in United States District Court for the Middle District of Georgia, at Macon, Wilbur D. Owens, Jr., J., of receiving, as a felon, a firearm which had traveled in interstate commerce, and

* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

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he appealed. The Court of Appeals held that the statute in question did not distinguish between violent and nonviolent felonies and that the firearm in question was not illegally seized.

Affirmed.

1. Weapons † 4

Defendant who had previously been convicted of conspiracy to violate internal revenue liquor laws, actual violation of such laws and possession of an illegal distillery was properly convicted of receipt, as felon, of firearm which had traveled in interstate commerce despite fact that prior convictions were for nonviolent felonies. 18 U.S.C.A. § 371; 18 U.S.C.A. App. § 1202(a), (c)(2); 26 U.S.C.A. (I.R.C.1954) §§ 5174, 5601.

2. Searches and Seizures † 3.3(6)

Where gun was in plain view on front seat of defendant's automobile, warrantless search of vehicle was lawful and firearm was legally seized.

396 **UNITED STATES v. TUCKER**

Appeal from the United States District Court for the Middle District of Georgia.

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judges.

PER CURIAM:

[1] Appellant's assertion that 18 U.S.C. App. § 1202(a), prohibiting a convicted felon from receipt of a

firearm which has traveled in interstate commerce, does not apply to him, is without merit. He had three prior convictions for conspiracy to violate Internal Revenue Liquor Laws (then 18 U.S.C. § 88, now 18 U.S.C. § 371), actual violation (26 U.S.C. § 5174), and possession of an illegal distillery (26 U.S.C. § 5601), all felonies. 18 U.S.C. App. § 1202(c)(2) defines a felony as:

> an offense punishable by imprisonment for a term exceeding one year, but does not include any offense . . . classified as a misdemeanor . . .

The statute does not distinguish between violent and non-violent felonies. Cf. United States v. Lincoln, 4 Cir., 1973, 487 F.2d 222, cert. denied 415 U.S. 976, 94 S.Ct. 1562, 39 L.Ed.2d 872 (1974).

[2] Appellant's allegation that the firearm in question was illegally seized is also without merit. The gun was in plain view on the front seat of appellant's car; under the circumstances here a warrantless search was lawful.

Affirmed.

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APPENDIX B

18 U.S.C., APPENDIX

§1202. Receipt, possession, or transportation of firearms–Persons liable; penalties for violations

(a) Any person who–

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

* * *

Definitions

(c) As used in this title–

* * *

(2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does

not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less;

* * *